# Pan Malaysian Pools Sdn Bhd v Kwan Tat Thai & Anor

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO S-22–17 OF 2009
AZIZUL AZMI JC
30 AUGUST 2016

*Contract — Employment contract — Breach — Discovery by company that quotations for purchase of items received vendors recommended by employees significantly higher than independent vendors — Evidence of profit sharing arrangement between employees and vendors — Whether employees breached express and/or implied terms of employment contract — Whether employees breached terms of employment by entering into unlawful profit sharing arrangement with vendors*

The plaintiff conducted a number forecast totalisator business which placed great reliance on IT infrastructure. The first defendant was a general manager of the plaintiff and headed its IT department. In addition, he was also a member of its Major Tender Committee and the chairman of its Minor Tender Committee, which were internal committees of the plaintiff that approved equipment purchases. The second defendant was the manager of the plaintiff's data centre operations within the IT department. The plaintiff's procurement department discovered that quotations for the purchase of routers received from vendors recommended by the defendants were significantly higher than those obtained from independent vendors identified by the procurement department. An investigation was carried out and it was discovered that a group of vendors were regularly called upon to provide quotes and that the prices quoted, although close to one another, were significantly higher than the prices quoted by vendors that had been independently sourced by the procurement department. The plaintiff took the view that the defendants had breached the terms of their employment, and the defendants were suspended from work. Further investigations revealed evidence of a profit sharing arrangement between the defendants, certain shareholders and/or directors of the plaintiff's registered vendors and other parties in respect of certain purchases of IT-related equipment by the plaintiff. There were 65 transactions that were the subject of the plaintiff's claim. The plaintiff claimed against the defendant for breach of their express and/or implied terms of their employment contract; and breach of their terms of employment for entering into an unlawful profit sharing arrangement with the vendors of the plaintiff.

**Held,** dismissing the claim:

(1) The defendants' joint purchases of the properties meant that they had acquired an interest that may conflict with the interests of the plaintiff, their employer. The plaintiff did have an interest in ensuring that the employees who have a role in the process of selecting vendors and suppliers to the plaintiff carry out their functions impartially. That was the key consideration in determining whether or not there was any breach of the terms of the relevant policies. Could the employees honestly say that, having entered into the joint real estate purchases with a director and shareholder of suppliers to the company, they can discharge their functions impartially and that a reasonable observer will find no conflict between their personal interests and the duty that was owed to their employer? The answer must be a resounding no. The interests of the defendants acquired through the joint property purchases ought to have been disclosed in writing to the plaintiff (see paras 29 & 31–32).

(2) The plaintiff had already availed itself of its remedy for breach of the employment terms when it dismissed the defendants. The existence of the joint purchases of the properties and the fact that those purchases had not been disclosed in writing to the plaintiff had not caused any loss to the plaintiff as would entitle it to the general damages claimed. In other words, the breach by the defendants of the purchasing policies did not cause any loss to the plaintiff that could be said to be the direct and natural consequence of such breach (see para 40).

(3) Although the substantial portion of the documents recovered from the primary hard disk was admissible, the probative value of these documents was insufficient to prove that, on a balance of probabilities, a profit sharing arrangement existed between the defendants and the relevant representatives from the vendors, or that the defendants and/or the representatives from the vendors with whom they had purportedly colluded had made profits from such arrangements. If there had been any error or defect in the process by which the documents were retrieved, it would have been extremely unlikely that it would have resulted in legible documents. The more likely result of a failure in the extraction process is that the data would have simply produced gibberish, in the same way for example if the wrong application were used to open a file (see paras 46 & 58).

(4) The evidence before the court was not capable of proving, on a balance of probabilities, that there existed a profit sharing arrangement between the defendants and the third parties identified in the reward spreadsheets or that the defendants and/or such third parties had received the amounts stated in the spreadsheets. The plaintiff's prayers for relief were dismissed (see para 70).

(5) The fact that the first defendant was a member of the Major Tender Committee and the chairman of the Minor Tender Committee meant

that he had a say in the decision-making process for equipment purchases. This was sufficient to impose on him a duty in equity to account for profits that he may have made to the detriment of the plaintiff, as his employer. Similarly, the second defendant was involved in conducting evaluations of tenders and submitting recommendations for the purchase of IT-related equipment. This was sufficient for there to be imposed upon the second defendant a duty to account for any secret profits that he may have made in breach of his duties as an employee. The plaintiff's claim failed for want of proof (see paras 73–75).

**[Bahasa Malaysia summary**

Plaintif menjalankan perniagaan mesin kiraan nombor ramalan yang meletakkan kepercayaan kepada infrastruktur IT. Defendan pertama ialah pengurus besar plaintif dan mengetuai jabatan ITnya. Selain itu, dia juga ahli Jawatankuasa Tender Utamanya dan pengerusi Jawatankuasa Tender Kecilnya, yang merupakan jawatankuasa-jawatankuasa dalaman plaintif yang meluluskan pembelian peralatan. Defendan kedua ialah pengurus operasi pusat data plaintif dalam jabatan IT itu. Jabatan perolehan plaintif mendapati bahawa sebut harga untuk belian penghala yang diterima daripada penjal yang disyorkan oleh defendan-defendan adalah lebih ketara tingginya daripada yang diperolehi daripada penjual berasingan yang dikenal pasti oleh jabatan perolehan itu. Satu siasatan telah dijalankan dan ia didapati bahawa segolongan penjual sering dipanggil untuk memberikan sebut harga dan bahawa harga-harga tersebut telah disebutharga, meskipun hampir sama antara satu sama lain, adalah ketara lebih tinggi daripada harga-harga yang disebutharga oleh penjual-penjual yang telah dicari secara berasingan oleh jabatan perolehan. Plaintif mengambil pandangan bahawa defendan-defendan telah melanggar terma-terma pekerjaan mereka, dan defendan-defendan telah digantung kerja. Selanjutnya siasatan mendedahkan keterangan berhubung aturan perkongsian keuntungan antara defendan-defendan, pemegang-pemegang saham tertentu dan/atau pengarah-pengarah untuk penjual-penjual berdaftar plaintif dan pihak-pihak lain berkaitan belian-belian tertentu untuk peralatan berkaitan IT oleh plaintif. Terdapat 65 transaksi yang merupakan subjek kepada tuntutan plaintif. Plaintif menuntut terhadap defendan untuk pelanggaran terma-terma nyata dan/atau tersirat mereka berhubung kontrak pekerjaan mereka; dan pelanggaran terma-terma pekerjaan mereka untuk memasuki aturan perkongsian keuntungan yang menyalahi undang-undang dengan penjual-penjual plaintif.

**Diputuskan,** menolak tuntutan:

(1) Belian-belian bersama defendan-defendan untuk hartanah tersebut bermaksud mereka telah memperolah kepentingan yang mungkin bertentangan dengan kepentingan plaintif, majikan mereka. Plaintif memang mempunyai kepentingan dalam memastikan bahawa

pekerja-pekerja yang mempunyai peranan dalam proses memilih penjual-penjual dan pembekal-pembekal kepada plaintif menjalankan fungsi-fungsi mereka secara adil. Itu adalah kunci pertimbangan dalam menentukan sama ada atau tidak terdapat apa-apa pelanggaran terma-terma polisi-polisi yang relevan. Bolehkah pekerja-pekerja dengan jujur mengatakan bahawa, telah memasuki belian hartanah bersama dengan pengarah dan pemegang saham pembekal-pembekal kepada syarikat itu, mereka boleh melaksanakan fungsi-fungsi mereka secara adil dan bahawa pemerhati yang munasabah akan mendapati tiada konflik antara kepentingan peribadi mereka dan kewajipan terhadap majikan mereka? Jawapan itu hendaklah negatif. Kepentingan defendan-defendan yang diperolehi melalui belian hartanah bersama patut didedahkan secara bertulis kepada plaintif (lihat perenggan 29 & 31–32).

(2) Plaintif telahpun menafikan dirinya untuk remedinya bagi pelanggaran terma-terma pekerjaan apabila ia memecat defendan-defendan. Kewujudan belian bersama hartanah itu dan fakta bahawa belian-belian tersebut tidak dizahirkan secara bertulis kepada plaintif tidak menyebabkan apa-apa kehilangan kepada plaintif yang melayakkannya kepada ganti rugi am yang dituntut. Dalam erti kata lain, pelanggaran oleh defendan-defendan berhubung polisi-polisi pembelian tidak menyebabkan apa-apa kehilangan kepada plaintif yang boleh dikatakan sebagai akibat secara langsung dan semula jadi pelanggaran tersebut (lihat perenggan 40).

(3) Walaupun sebahagian besar dokumen-dokumen yang didapatkan semula daripada cakera keras utama boleh diterima, nilai probatif dokumen-dokumen tersebut tidak mencukupi untuk membuktikan bahawa, atas imbangan kebarangkalian, satu aturan perkongsian keuntungan wujud antara defendan-defendan dan wakil-wakil relevan daripada penjual-penjual, atau bahawa defendan-defendan dan/atau wakil-wakil daripada penjual-penjual yang mana dengan mereka telah kononnya berpakat secara sulit telah membuat keuntungan daripada aturan-aturan tersebut. Jika terdapat apa-apa kesilapan atau kecacatan dalam proses di mana dokumen-dokumen tersebut didapatkan semula, ia sangat tidak berkemungkinan bahawa ia akan menyebabkan dokumen-dokumen boleh dibaca. Hasil yang lebih berkemungkinan kegagalan dalam proses pengekstrakan adalah bahawa data itu akan hanya menghasilkan bahan yang serabut, dengan cara yang sama sebagai contoh jika aplikasi yang salah digunakan untuk membuka fail (lihat perenggan 46 & 58).

(4) Keterangan di hadapan mahkamah tidak mampu membuktikan, atas imbangan kebarangkalian, bahawa terdapat aturan perkongsian keuntungan antara defendan-defendan dan pihak ketiga yang

dikenalpasti dalam ganjaran *spreadsheet* atau bahawa defendan-defendan dan/atau pihak ketiga telah menerima jumlah yang dinyatakan dalam *spreadsheet* itu. Permohonan plaintif untuk relif telah ditolak (lihat perenggan 70).

(5) Fakta bahawa defendan pertama ialah ahli Jawatankuasa Tender Utama dan pengerusi Jawatankuasa Tender Kecil bermaksud bahawa dia mempunyai kata dalam proses membuat keputusan bagi belian peralatan. Ini mencukupi untuk mengenakan ke atasnya kewajipan dalam ekuiti untuk mengambil kira keuntungan bahawa dia mungkin telah merugikan plaintif, sebagai majukannya. Begitu juga, defendan kedua terlibat dalam menjalankan penilaian tender-tender dan mengemukakan syor-syor bagi belian peralatan berkaitan IT. Ini mencukupi untuk mengenakan ke atas defendan kedua satu kewajipan bagi mengambil kira apa-apa keuntungan rahsia bahawa dia mungkin telah melakukan pelanggaran kewajipannya sebagai pekerja. Tuntutan plaintif telah gagal kerana tiada bukti (lihat perenggan 73–75).]

**Notes**

For cases on breach, see 3(3) *Mallal's Digest* (5th Ed, 2015) paras 4879–4887.

**Cases referred to**

*Alexander v Standard Telephones and Cables Ltd (No 2); Wall v Standard Telephones and Cables Ltd (No 2)* [1991] IRLR 286, QBD (folld)

*Devram Nanji Dattani v Haridas Kalidas Dawda* (1949) 16 EACA 35, CA (refd)

*Intergraph Systems South East Asia Pte Ltd v Zhang Yiguang (suing by the committee and estate of his person, Tong Wen Li)* [2005] 1 SLR 255, CA (refd)

*Mohamad Fauzi bin Che Rus v JR Joint Resources Holdings Sdn Bhd* [2016] 8 MLJ 739, HC (refd)

*Mohd Khayry bin Ismail v PP* [2014] 4 MLJ 317; [2014] 1 LNS 412, CA (folld)

*Ng Thian Soong v PP* [1990] 2 MLJ 148, SC (refd)

*Nottingham University v Fishel* [2000] EWHC 221 (QB), QBD (refd)

*PP v Sarjit Kaur a/p Najar Singh* [1998] 1 MLJ 184, HC (refd)

*SDA Architects (sued as a firm) v Metro Millennium Sdn Bhd* [2014] 2 MLJ 627, CA (refd)

*Sinnaiyah & Sons Sdn Bhd v Damai Setia Sdn Bhd* [2015] 5 MLJ 1; [2015] 7 CLJ 584, FC (folld)

**Legislation referred to**

Evidence Act 1950 ss 21, 90A

Rules of Court 2012 O 34 r 2(2)

*Janice Anne Leo (M Mehala and David Ng Yew Kiat with her) (Shook Lin & Bok) for the plaintiff.*
*JD Goonting (ML Lum and SJ Kum with him) (Kum & Partners) for the first defendant.*
*Albert Koo (Chin & Rakan-rakan) for the second defendant.*

**Azizul Azmi Adnan JC:**

INTRODUCTION

**[1]** The plaintiff in this case, Pan Malaysian Pools Sdn Bhd, sued Kwan Tat Thai and Wan Kong Wai, the first and second defendants respectively, for (among others) the recovery of secret profits alleged to have been obtained by the defendants at the plaintiff's expense, in connection with the procurement by the plaintiff of information technology-related equipment. The defendants are former employees of the plaintiff.

**[2]** There were over 20 trial days for this case, and more than 3000 pages of exhibits. Submissions were commensurately lengthy. Despite the complexity and volume of the evidence, I found that the crux of the issue turned simply on the probative value of the forensic computer-generated evidence that had been recovered from the computer that been assigned to the first defendant.

**[3]** Having heard the submissions of counsel, I found that:

(a) the defendants had breached their terms of employment by not disclosing the fact that they had made joint purchases of real properties together with the directors and shareholders of vendors of the plaintiff;

(b) however, the plaintiff had already availed itself of its remedy for breach of the employment terms when it dismissed the defendants; and

(c) the probative value of the forensic computer-generated documents was insufficient to prove that, on a balance of probabilities, a profit sharing arrangement existed between the defendants and the relevant representatives from the vendors, or that the defendants and/or such representatives had made profits or received any money from such arrangements.

**[4]** Although I refused the plaintiff's prayers for relief, I awarded costs of RM100,000 to the plaintiff, to be borne equally by the defendants, on the basis that they were responsible for the events leading to the litigation of this matter.

**[5]** The plaintiff has now appealed against this decision.

*Material background facts*

**[6]** The background facts of this case, in so far as they were material to the determination of the issues in dispute, are summarised in the following paragraphs.

**[7]** The plaintiff conducts a number forecast totalisator business. It is not in dispute that this business places great reliance on the IT infrastructure employed by the plaintiff.

**[8]** The first defendant was a general manager of the plaintiff and headed its IT department. In addition, he was also a member of its Major Tender Committee and the chairman of its Minor Tender Committee, which are internal committees of the plaintiff that approves equipment purchases.

**[9]** The second defendant was the manager of the plaintiff's data centre operations within the IT department. He reported directly to the first defendant.

**[10]** In February 2007, the plaintiff's procurement department discovered that quotations for the purchase of routers received from vendors recommended by the defendants were significantly higher those obtained from independent vendors identified by the procurement department. An investigation was carried out, which culminated in a report dated 16 April 2007. At trial, I ruled that certain portions of this report was inadmissible as proof of the statements contained therein, on the basis that they were documentary hearsay. Nothing however turned on this, as the incident involving the purchase of the routers did not form the basis of the plaintiff's claim.

**[11]** Arising from April 2007 report, further investigations were carried out by the procurement department, this time involving five different types of IT-related equipment. A further report, dated 12 June 2007, was issued, which found that a group of vendors were regularly called upon to provide quotes and that the prices quoted, although close to one another, were significantly higher than the prices quoted by vendors that had been independently sourced by the procurement department.

**[12]** At the material time, the plaintiff was a subsidiary of Tanjong Plc. The Tanjong group corporate assurance department, which performed the internal audit function for the Tanjong group of companies, was tasked to investigate further. Their investigations found that the first defendant, the second defendant and one Ho Yew Fai (also known as Kenneth Ho) had jointly purchased a property ('the Solaris property'). Ho Yew Fai was a director and

shareholder of Gallant Mark Sdn Bhd ('Gallant Mark') and iConnect2 Technologies Sdn Bhd ('iConnect2'), both of which companies were registered vendors of the plaintiff.

**[13]** The plaintiff took the view that the defendants had breached the terms of their employment, and the defendants were suspended from work on 10 October 2007. At the same time, the plaintiff also took custody of the notebook computers that had been assigned to defendants.

**[14]** Following the suspension of the defendants, further investigations by the group corporate assurance department found that the first defendant had jointly purchased another property ('Lorong Midah property') with one Foo Kok Kee (also known as Adrian Foo). Foo Kok Kee was also a director and shareholder of Gallant Mark and iConnect2.

**[15]** The plaintiff replicated the contents of the hard disk drives from the notebook computers retrieved from the defendants, and undertook a forensic examination of the data that had been so retrieved. From the data recovered from the replicated hard drive of the notebook computer that had been assigned to the first defendant, the plaintiff found Microsoft Excel spreadsheets and emails that it considered to be evidence of a profit sharing arrangement between the defendants, certain shareholders and/or directors of the plaintiff's registered vendors and other parties in respect of certain purchases of IT-related equipment by the plaintiff.

**[16]** The plaintiff maintained that it was able to match specific items contained in the reward spreadsheets to the particular purchases of IT-related equipment that had been undertaken by the plaintiff. There were 65 transactions that were the subject of the plaintiff's claim.

**[17]** The plaintiff also recovered, from the office occupied by the first defendant, fund transfer receipts recording the transfer of funds to one Con Kostanti, from Ho Yew Fai and from the first defendant as well as the transfers of funds by the first defendant to his bank account in Singapore. Con Kostanti was a representative from another registered vendor of the plaintiff, Tabcorp International Pty Ltd ('Tabcorp').

**[18]** Following a domestic inquiry, the plaintiff dismissed the defendants on 29 February 2008.

*The plaintiff's claims*

**[19]** The plaintiff's claim against the defendant can be categorised into the following:

(a) firstly, the plaintiff contended that the defendants had breached their express and/or implied terms of their employment contract by the joint purchases of the Solaris property and the Lorong Midah property in the manner described in paras 12 and 14 *ante*. The plaintiff claimed for general damages arising from such breach; and

(b) secondly, the plaintiff also claimed that the defendants, in breach of their terms of employment, had entered into an unlawful profit sharing arrangement with the vendors of the plaintiff and were therefore liable to account to the plaintiff for the secret profits that they had attained from the 65 transactions.

**[20]** Each of the plaintiff's claim is considered in turn.

THE JOINT PURCHASES OF THE PROPERTIES

**[21]** This court found that the joint purchase by the defendants of the Solaris property and the joint purchase by the first defendant of the Lorong Midah property and their failure to disclose those purchases in writing to the plaintiff amounted to a contravention of the plaintiff's purchasing and contracting policies and procedures ('the purchasing policies'). The purchasing policies have been incorporated by reference into the terms of the employment contracts between each defendant and the plaintiff. As such, the contravention of the purchasing policies amounted to a breach of their employment terms. However, the plaintiff had already availed itself of its remedy for breach of the employment terms when it dismissed the defendants. The joint purchases of the properties had not caused any loss to the plaintiff as would entitle it to general damages. The substantive relief sought by the plaintiff for the disgorgement of secret profits was dependent on proof of the purported unlawful profit arrangements, which are considered in further detail at para 41 *et seq*, *post*.

**[22]** These findings and conclusions are explained in the following paragraphs.

*Whether policies incorporated by reference*

**[23]** It is not in dispute that both contracts of employment of the defendants made reference to the plaintiff's rules and procedures as revised from time to time.

**[24]** In my judgment, there is no doubt that the contracting parties had intended for all the rules and policies of the company as may be formulated or revised from time to time to be incorporated by reference into the terms of the

employment contract. Even though the Purchasing Policies were not referred to by name, I am of the view that the are expressly incorporated by the general words of the letters of employment.

**[25]** Counsel for the defendants directed the attention of the court to the Singapore Court of Appeal decision in *Intergraph Systems South East Asia Pte Ltd v Zhang Yiguang (suing by the committee and estate of his person, Tong Wen Li)* [2005] 1 SLR 255, where the Court of Appeal approved of the following principles applied in the case of *Alexander v Standard Telephones and Cables Ltd (No 2); Wall v Standard Telephones and Cables Ltd (No 2)* [1991] IRLR 286:

> Where a document is expressly incorporated by general words it is still necessary to consider, in conjunction with the words of incorporation, whether any particular part of that document is apt to be a term of the contract; if it is inapt, the correct construction may be that it is not a term of the contract. Where it is not a case of express incorporation, but a matter of inferring the contractual intent, the character of the document and the relevant part of it and whether it is apt to form part of the individual contract is central to the decision whether or not the inference should be drawn.

**[26]** Applying the test in that case, the question therefore is whether having regard to the terms of the policies, whether they are apt to be incorporated into the employment contract.

**[27]** In my judgment, the purchasing policies are clearly apt for incorporation by reference into the terms of employment of each defendant. The purchasing policies control and regulate the manner in which goods and services are to be acquired by all the companies in the Tanjong Plc group of companies, and to this end contains clearly stated rules applicable to staff to prevent conflicts of interests from arising. It is therefore reasonable to expect staff to comply with the requirements contained in the purchasing policies as part of their employment terms.

*Whether a disclosure was required under the purchasing policies*

**[28]** The purchasing policies contain a number of rules intended to regulate conflicts of interests. It is only necessary to refer to one of them. Section 2.6(i) of the purchasing policies provide:

> Staff/committee members (ie Tender Committee, Registration Committee and other committee formed subsequently for the purposes of implementing the purchasing and contracting policies and procedures of the Company), who are engaged or involved in purchasing activities and have personal interests in the purchases or tendering, whether directly or indirectly, must make full disclosure in writing to the Management, to avoid conflict of interest.

**[29]** In my judgment, the defendants' joint purchases of the properties meant that they had acquired an interest that may conflict with the interests of the plaintiff, their employer.

**[30]** The argument may be made that the interests of the defendants in the properties did not amount to 'personal interests in the purchases or tendering'. In addition, the plaintiff likely has no interest in engaging in real estate investments.

**[31]** However, the plaintiff does have an interest in ensuring that the employees who have a role in the process of selecting vendors and suppliers to the plaintiff carry out their functions impartially. This is the key consideration in determining whether or not there has been any breach of the terms of the relevant policies. Can the employees honestly say that, having entered into the joint real estate purchases with a director and shareholder of suppliers to the company, they can discharge their functions impartially and that a reasonable observer will find no conflict between their personal interests and the duty that was owed to their employer? The answer must be a resounding No.

**[32]** Accordingly, I am of the view that the interests of the defendants acquired through the joint property purchases ought to have been disclosed in writing to the plaintiff.

*Was there disclosure?*

**[33]** In his testimony at trial, the second defendant said that the first defendant, in the presence of the second defendant, had previously disclosed their joint property purchases verbally to the then chief executive and chief operating officers of the plaintiff. This purportedly took place at a hospitality box at the Selangor Turf Club.

**[34]** It was advanced for the defendants that the plaintiff could not have obtained the information relating the joint purchase of the Solaris property unless that information had in fact been obtained when the disclosure was made to the two senior officers of the plaintiff.

**[35]** The plaintiff's version of events, advanced through PW3, was that it had employed a 'runner' to scour the records of utility providers, and that a search had revealed the name of one of the defendants as an account holder at Tenaga Nasional Bhd, the national electricity company, in respect of the Solaris property. Having obtained the address listed for the account, the plaintiff then conducted searches at the relevant land office. Although the defendants were not listed as the registered proprietors of the Solaris property, a caveat lodgement form revealed that they together with Ho Yew Fai (a director and

shareholder of registered suppliers to the plaintiff), as vendors, had entered into a sale and purchase agreement with a third party to sell the Solaris property to that third party.

**[36]** The defendants called a representative of TNB to testify at trial. This witness, who was the general manager of the Corporate Advisory and Commercial Unit at TNB, testified that the utility company does not make its database available to the public for the purposes of conducting account holder searches.

**[37]** Having had the benefit of hearing the *viva voce* testimony of PW3, I found him to be a reliable witness and that there was no reason to disbelieve his testimony. It may well be that TNB does not make its database available to the public, but this does not mean that the database had not been accessed through unofficial channels, in the way that the testimony of PW3 seemed to suggest.

**[38]** In any event, even if the version of events offered by the second defendant were to be accepted as true, the fact remains that no disclosure of their interests in the property purchases had been in writing to the plaintiff, as required by the terms of the purchasing policies.

**[39]** Accordingly, having regard to the analysis set out in the preceding paragraphs, I found that the joint property purchases amounted to a contravention of the purchasing policies, and consequently a breach of the defendants' terms of employment with the plaintiff.

*Remedy available to the plaintiff for breach of terms of employment*

**[40]** In my judgment, the plaintiff had already availed itself of its remedy for breach of the employment terms when it dismissed the defendants. The existence of the joint purchases of the properties and the fact that those purchases had not been disclosed in writing to the plaintiff has not caused any loss to the plaintiff as would entitle it to the general damages claimed. In other words, the breach by the defendants of the purchasing policies have not caused any loss to the plaintiff that can be said to be the direct and natural consequence of such breach. The substantive relief sought by the plaintiff for the disgorgement of secret profits was dependent on proof of the secret profit sharing arrangements, which is considered in the following paragraphs.

THE SECRET PROFIT ARRANGEMENTS

**[41]** The plaintiff contended that the defendants had colluded with a group of vendors who were regularly called upon to provide quotes. These quotes, although close to one another, were — contended the plaintiff — substantially

higher than the actual value of the equipment in question. The higher profit obtained by the vendors in question were then shared between the defendants and certain individuals connected with the vendors.

**[42]** It was not in dispute that the procurement procedures did not confer on the defendants any ability or authority to make a final decision on the selection of a successful vendor. Nonetheless, the plaintiff claimed that the quotation process was manipulated in such a way so that the quotations were sufficiently inflated so as to ensure that even the winning bid (which was almost always the lowest price quoted) would be higher than what the plaintiff ought to have paid for the goods.

**[43]** Thus, even though on the surface it may have appeared that the purchasing policies were being adhered to, the plaintiff alleged that it had been paying more that it ought to have for the equipment in question.

**[44]** The plaintiff's contention that the defendants had made secret profits relied almost entirely on the forensic evidence retrieved from the hard disk drive contained in the notebook computer that had been assigned to the first defendant. For ease of reference, this hard disk drive is heretofore referred to as the 'primary hard disk'. The evidence comprised Microsoft Excel spreadsheets and emails that may be conveniently categorised into the following:

(a) the reward spreadsheets, which purported to identify the items purchased and the profit share attributable to certain parties;

(b) the investment spreadsheets, purporting to show certain investments made by the first defendant;

(c) the share buyback spreadsheets, which purported to show the shareholding in Gallant Mark and another company Elegant Distribution Sdn Bhd ('Elegant Distribution'); and

(d) certain web-based emails.

**[45]** The plaintiff sought to establish at trial that some of the items contained in the reward spreadsheets could be related to 65 specific transactions, for which the plaintiff had raised purchase orders and in respect of which it purchased IT-related equipment. It was further contended by the plaintiff that:

(a) the reward spreadsheets showed that profits from these transactions had been distributed to persons identified in the reward spreadsheets as 'mek', 'wan', 'ct', 'con', 'kh' and 'comp';

(b) 'mek' referred to the first defendant, who was habitually referred to at work as 'Erik Kwan' or 'EK'; and

(c) 'wan' referred to the second defendant, who was called 'WAN' in his correspondence and dealings.

**[46]** I ruled that, although the substantial portion of the documents recovered from the primary hard disk was admissible, the probative value of these documents was insufficient to prove that, on a balance of probabilities, a profit sharing arrangement existed between the defendants and the relevant representatives from the vendors, or that the defendants and/or the representatives from the vendors with whom they had purportedly colluded had made profits from such arrangements.

**[47]** This finding is explained in detail in the following paragraphs.

*Admissibility of the computer generated evidence*

**[48]** In case management conferences conducted prior to trial, the documents retrieved from the forensic examination of the primary hard disk had been marked as Part C documents for the purposes of O 34 r 2(2) of the Rules of Court 2012. This meant that the plaintiff would have needed to adduce primary evidence of the documents in order for the documents to be admissible.

**[49]** At trial, counsel for the defendants maintained their objections on the admissibility of the computer evidence. It was established from the testimony of witnesses for the plaintiff that the documents retrieved from the primary hard disk that had been printed for inclusion into the trial bundles were not in fact printed from primary hard disk itself, but had been printed from a hard disk drive that had been cloned from the primary hard disk. I therefore ruled that these documents were not primary evidence, and hence were not admissible as evidence. However, I permitted the plaintiff to subsequently re-file the print-outs from the primary hard disk. This was done, but a small number of documents that had been initially included in the trial bundles could not be located when the subsequent attempt was made to print the documents directly from the primary hard disk. This fact was not, however, material for the purposes of the determining the issue of liability in this case.

**[50]** Once it was established that the documents recovered from the forensic examination of the primary hard disk was primary evidence, the next issue to be decided was whether these documents were admissible.

**[51]** When the forensic evidence was retendered, a certificate pursuant to s 90A of the Evidence Act 1950 was also tendered in evidence by PW5, who was an employee of KPMG Management and Risk Consulting Sdn Bhd, which had been engaged by the plaintiff to undertake the forensic examination

of the primary hard disk. This certificate was signed by PW5, who was also the person responsible for the management of the operation of the computers that had been used to generate the documents that had been retendered. Of course, the first defendant, whom it could be said to have been the responsible for the management of the notebook computer that had been assigned to him by the plaintiff, did not tender any such certificate.

**[52]** I nonetheless ruled that the documents retrieved from the forensic examination of the primary hard disk to be admissible, on the authority of the principle established in *Mohd Khayry bin Ismail v Public Prosecutor* [2014] 4 MLJ 317; [2014] 1 LNS 412. I have had the opportunity to consider in detail the issue of the admissibility of computer-generated evidence in the case of *Mohamad Fauzi bin Che Rus v JR Joint Resources Holdings Sdn Bhd* [2016] 8 MLJ 739, at paras 18–36, a decision that is at the time of writing on appeal to the Court of Appeal. In that case, I ruled that computer-generated documents could be admissible even in circumstances where the requirements of s 90A of the Evidence Act 1950 had not been complied with, provided either that the makers of the document were called or that the documents were admissible under any other established exception to the rule against hearsay. In the present case, the computer-generated evidence retrieved from the forensic examination of the primary hard disk was sought to be proved against the putative maker of the documents (the first defendant), and hence the documents were admissible as admissions of facts in issue pursuant to s 21 of the Evidence Act 1950.

**[53]** Having established that the forensic evidence was admissible, I now turn to the probative value to be attached to that evidence, an issue which I found to be determinative in this case. In assessing the weight to be attached to the documents retrieved from the primary hard disk, there were two distinct but related issues: first, the authenticity of the documents, and second, whether they were capable of the proving the facts in issue. These are considered in turn in the following paragraphs.

*Authenticity*

**[54]** Having considered the evidence as a whole and in particular the numerous reasons raised by counsel for the defendants, I was of the view that the computer generated documents retrieved from the first defendant's computer were authentic.

**[55]** The objection raised by counsel for the defendants against the documents related to the integrity of the process by which the documents were retrieved from the computer. Counsel for the first defendant drew the court's attention to various observations that could be made in respect of the evidence

retrieved from the primary hard disk, which in the opinion of counsel cast doubt on the reliability and integrity of the electronic evidence. These included the following:

(a) log entries retrieved from the primary hard disk showed that the notebook computer that had been assigned to the first defendant had been accessed after the suspension of the defendants. The testimony of the plaintiff's witness was that a device known as a write blocker had been used in the process of retrieving the documents from the primary hard disk, which would have prevented any data being written to the primary hard disk, including the fact that the notebook computer had been accessed. Thus the log entries, according to the defendants, were not consistent with the plaintiff's version of events;

(b) evidence was led to the effect that the computer had been accessed after its BIOS clock battery had expired (BIOS is a firmware in a computer's operating system that manages the data flow between the central processing unit and components attached to it. The BIOS clock keeps time for the computer even when it is turned off, and is frequently powered by a lithium battery. Once this battery expires, the log entries can show that a computer had been accessed on dates that do not make sense — as was the case here);

(c) metadata analysis showed the creation, access, modification and deletion of the spreadsheet files within a short period of time. In this connection, there was expert testimony received to the effect that this could occur where files that had been created on another computer had been copied onto the primary hard disk; and

(d) there were some unexplained visual differences in the print-outs of the web-based emails.

**[56]** The counsel for the first defendant also contended the plaintiff had not shown that there had not been any break in the chain of custody of the notebook computer in question. Doubt was also cast as to the genuineness of the primary hard disk, as the plaintiff had not specifically identified the brand name, model number, serial number or other identifying features of the notebook computer that had been assigned to, and subsequently taken back from, the first defendant.

**[57]** The sum effect of the evidence, according to counsel for the defendants, was that it showed that the computer evidence sought relied upon by the plaintiff was not reliable.

**[58]** In my judgment, if there had been any error or defect in the process by which the documents were retrieved, it would have been extremely unlikely

that it would have resulted in legible documents. The more likely result of a failure in the extraction process is that the data would have simply produced gibberish, in the same way for example if the wrong application were used to open a file.

**[59]** The next question was whether there was any reason to doubt the authenticity of the documents that were retrieved from the primary hard disk. The only other possible explanation for the existence of the documents retrieved from the primary hard disk was that they had been fabricated and planted to implicate the defendants. At trial, I found the third witness for the plaintiff, Mr Ghanapathi Balakrishnan, to be a reliable and truthful witness. He was at the material time a manager in the Group Corporate Assurance Department of the Tanjong Plc group of companies, and was involved in the investigation on the defendants. I was of the view that, based on the testimonies received at trial, it would not have been possible for any tampering to have been done on the primary hard disk without Mr Ghanapathi's knowledge.

**[60]** Accordingly, having regard to the foregoing, I found that, on a balance of probabilities, that the documents retrieved from the hard disk drive of the computer assigned to the first defendant to be authentic, in the sense that they were documents that had been genuinely recovered from the notebook computer that had been assigned to the first defendant.

*Weight*

**[61]** The next question was whether the documents amounted to sufficient evidence to prove the facts in issue. In my judgment, the evidence did not establish that, on a balance of probabilities, that a secret profit arrangement existed.

**[62]** As explained at para 44 *ante*, the plaintiff's case depended substantially on the probative value of the reward spreadsheets. Although the forensic examination of the primary hard disk disclosed other documents that could be said to be suggestive of impropriety, none of these other items of evidence amounted to direct evidence relating to the issue of whether there existed a secret profit arrangement. For example, the investment spreadsheets (see para 44(b) *ante*) purportedly showed a statement of investments made by the first defendant, but these items of investments were not linked back to the rewards spreadsheet. There was also no direct evidence to show that amounts that had been transferred into the defendants' accounts corresponded to the alleged secret profits that had been distributed to the defendants.

**[63]** The distinction between circumstantial evidence and direct evidence and the proper treatment of circumstantial evidence is explained in the

following passage of the judgment of Visu Sinnadurai J in *Public Prosecutor v Sarjit Kaur a/p Najar Singh* [1998] 1 MLJ 184:

> Circumstantial evidence is evidence of circumstances surrounding an event or offence from which a fact in issue may be inferred. Some examples of circumstantial evidence are: (a) motive; (b) acts preparatory to the commission of the offence; (c) fingerprints; (d) possession of stolen goods; and (e) presumptions of fact.
>
> The law on circumstantial evidence is stated by the learned editors of *Blackstone's Criminal Practice 1991* at pp 1674–1675 as follows:
>
> > Circumstantial evidence is to be contrasted with direct evidence. Direct evidence is evidence of facts in issue. In the case of testimonial evidence, it is evidence about facts in issue of which the witness claims to have personal knowledge, for example, 'I saw the accused strike the victim'. Circumstantial evidence is evidence of relevant facts, ie facts from which the existence or non-existence of facts in issue may be inferred. It does not necessarily follow that the weight to be attached to circumstantial evidence will be less than that to be attached to direct evidence. For example, the tribunal of fact is likely to attach more weight to a variety of individual items of circumstantial evidence, all of which lead to the same conclusion, than to direct evidence to the contrary coming from witnesses lacking in credibility.
>
> The learned editors point out further:
>
> > Circumstantial evidence 'works by cumulatively, in geometrical progression, eliminating other possibilities' (*Director of Public Prosecutions v Kilbourne* [1973] AC 729, per Lord Simon at p 758). Pollock CB, likening circumstantial evidence to a rope comprised of several cords, said:
> >
> > > One strand of the cord might be insufficient to sustain the weight, but three stranded together may be quite of sufficient strength.
> >
> > Thus, it may be in circumstantial evidence that there may be a combination of circumstances, no one of which would raise a reasonable conviction or more than a mere suspicion but the whole, taken together, may create a strong conclusion of guilt, that is with as much certainty as human affairs can require or admit of (Exall (1866) 4 F & F 922 at p 929).
> >
> > However, although circumstantial evidence may sometimes be conclusive, it must always be narrowly examined, if only because it may be fabricated to cast suspicion on another. For this reason, it has been said that:
> >
> > > It is also necessary before drawing the inference of the accused's guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference (*Teper v The Queen* [1952] AC 480, per Lord Normand at p 489).
> >
> > Nonetheless, there is no requirement, in cases in which the prosecution's case is based on circumstantial evidence, that the judge direct the jury to acquit unless they are sure that the facts proved are not only consistent with guilt but also inconsistent with any other reasonable conclusion (*McGreevy v Director of Public Prosecutions* [1973] 1 WLR 276).

Similar to the English position, it is also now established in Malaysia that in cases where circumstantial evidence is relied upon by the prosecution, the proper test to be applied by the judge trying a case without the jury is for the judge:

> ... to remember only that the prosecution need prove its case beyond reasonable doubt, and failure by him to also say that the circumstances are not only consistent with the accused having committed the crime but also such that they are inconsistent with any other reasonable explanation, is not fatal. In other words,... in a case depending on circumstantial evidence, it is enough if the court merely says that it is satisfied of the accused's guilt beyond reasonable doubt, without further saying that the facts proved irresistibly point to one and only one conclusion, namely the accused's guilt (per Suffian LP in *Jayaraman & Ors v PP* [1982] 2 MLJ 306 at p 310).

**[64]** To summarise: circumstantial evidence is evidence of the circumstances surrounding an event from which a fact in issue may be inferred, whereas direct evidence is evidence of the fact in issue itself. In evaluating circumstantial evidence, it is no longer necessary for a court to ask itself the question whether the evidence is inconsistent with any other conclusion or hypothesis: see the dicta of Mohd Azmi FCJ in *Ng Thian Soong v Public Prosecutor* [1990] 2 MLJ 148. Of course the present case was not criminal in nature, and therefore, following *Sinnaiyah & Sons Sdn Bhd v Damai Setia Sdn Bhd* [2015] 5 MLJ 1; [2015] 7 CLJ 584, the applicable standard of proof is on a balance of probabilities.

**[65]** Two related facts in issue that must be proven by the plaintiff are, firstly, the existence of a profit sharing arrangement and secondly, receipt by the defendants of money out of such profit sharing arrangement. In the event that the plaintiff fails to prove either of these facts on a balance of probabilities, its case must necessarily fail.

**[66]** In my judgment, the reward spreadsheets were direct evidence of the existence of a profit sharing arrangement. The plaintiff has demonstrated that there were items in the reward spreadsheets that could be directly linked to specific purchase orders and invoices relating to the purchase of IT-related equipment by the plaintiff.

**[67]** However, in relation to the issue of whether the defendants had received any money or other gratification from the profit sharing arrangement, the reward spreadsheets are merely circumstantial evidence, as they require the court to draw an inference that the sums set out in the spreadsheets had in fact been paid to the defendants.

**[68]** The other items of circumstantial evidence operating in favour of the plaintiff include:

(a) by the joint purchases of the Lorong Midah and Solaris properties, it was established that the defendants had an undisclosed relationship of a pecuniary nature with Ho Yew Fai and Foo Kok Kee, the directors and shareholders of iConnect2 and Gallant Mark. These companies were registered vendors to the plaintiff. Although the existence of this undisclosed pecuniary relationship does not of itself prove the existence of the profit sharing arrangement, it does go towards supporting the contentions of the plaintiff by the fact that there had been a prior commercial arrangement between the parties involved;

(b) the persons identified as 'kh', 'ct' and 'con' in the reward spreadsheets corresponded to Ho Yew Fai (who was also known as Kenneth Ho), Wong Chin Tat and Con Kostanti respectively. Wong Chin Tat was a general manager and former director of iConnect2. It will be recalled that Con Kostanti was, at the material time, an employee of Tabcorp. Like iConnect2 and Gallant Mark, Tabcorp was a registered supplier to the plaintiff and was regularly called upon to provide quotes for the procurement of IT-related equipment by the plaintiff;

(c) the share buyback spreadsheets (see para 44(c) *ante*) suggested that the defendants were given a notional shareholding in Gallant Mark and Elegant Distribution, based on which profit distributions were made to the defendants;

(d) the investment spreadsheets (see para 44(b) *ante*) purported to show investments that had been made by the first defendant into Gallant Mark, Elegant Distribution and iConnect2, into real property and listed shares, as well as investments held in fixed deposits, in bank accounts and held at the Employee Provident Fund;

(e) a web-based email (B14/1702) that had been retrieved from the primary hard disk showed a discussion between Con Kostanti and the first defendant regarding profits that had been allocated to the former; and

(f) there were funds transfer receipts that were recovered after the dismissal of the first defendant from his former office. These receipts showed:

(i) the transfer of AUD7,000 from Ho Yew Fai to Con Kostanti; and

(ii) the transfers of funds on two separate occasions in the amounts of more than AUD3,000 and AUD4,000 from the first defendant to Con Kostanti.

There was also receipts showing transfers by the first defendant to his own account held in a bank in Singapore, but I did not consider these relevant for the purposes of establishing the plaintiff's case.

**[69]** Against these items of evidence were the following considerations:

(a) although there were instances where the reward spreadsheets could be matched to specific transactions that had been undertaken by the plaintiff, there were also other reward spreadsheets retrieved from the primary hard disk that were not capable of being perfectly matched to any specific purchase order, invoice or payment. That this was so is established by the fact that the original statement of claim cited 127 transactions that were the subject of the plaintiff's claim. The statement of claim was subsequently amended to only refer to the 65 incidences of 'perfect matches';

(b) there was no direct evidence that either defendant had received funds that would be traced back to any of Ho Yew Fai, Foo Kok Kee, Wong Chin Tat, iConnect2, Gallant Mark or Elegant Distribution. Although evidence was led regarding the bank account statements of the defendants, none of the payments into such accounts were shown to have corresponded to any particular instance where it was alleged that profits from a transaction involving the purchase of IT-related equipment by the plaintiff was shared with the defendants; and

(c) the existence of a secret profit arrangement by itself would also be insufficient for the plaintiff to succeed in its claim. The plaintiff must also show that the defendants and the relevant third parties had received the profits. In my view, the only documents that went towards proving that the defendants had received secret profits were the reward spreadsheets, and even here the evidence was circumstantial. The reward spreadsheets are circumstantial evidence because they require the court to infer that the sums set out against the names of the persons in the reward spreadsheets had been paid to such persons. They do not constitute direct evidence of receipt of the secret profits. There was no other document that was capable of proving receipt of funds.

**[70]** Having evaluated the evidence as a whole, I came to the view that the evidence before this court was not capable of proving, on a balance of probabilities, that there existed a profit sharing arrangement between the defendants and the third parties identified in the reward spreadsheets or that the defendants and/or such third parties had received the amounts stated in the spreadsheets. For this reason, I dismissed the plaintiff's prayers for relief.

*The employee as a fiduciary*

**[71]** Having made the determination that the plaintiff has not proven the allegation that the defendants had received secret profits, it will not be strictly necessary for me to consider in detail the arguments raised by counsel regarding the ability of an employer to mount an equitable claim against an employee for secret profits. I will however briefly summarise the position in law.

**[72]** Although an employee may owe a duty of fidelity to his or her employer, this does not of itself make the employee a fiduciary. The employer-employee relationship is a contractual one, and, in general, imposes no fiduciary duties upon the employee. However, the fact that the relationship is premised upon contractual principles does not preclude the possibility of fiduciary duties being imposed on the employee, or the possibility that fiduciary duties may arise out of the employment contract. The circumstances of an employee's employment may be such that equity imposes more rigorous fiduciary duties on the employee for the performance of certain contractual obligations. In such circumstances, however, the scope of the fiduciary obligations are circumscribed by the terms of the employment contract. See *Nottingham University v Fishel* [2000] EWHC 221 (QB).

**[73]** In the present instance, the fact that the first defendant was a member of the Major Tender Committee and the chairman of the Minor Tender Committee meant that he had a say in the decision-making process for equipment purchases. This was sufficient to impose on him a duty in equity to account for profits that he may have made to the detriment of the plaintiff, as his employer.

**[74]** Similarly, the second defendant was involved in conducting evaluations of tenders and submitting recommendations for the purchase of IT-related equipment. This in my judgment was sufficient for there to be imposed upon the second defendant a duty to account for any secret profits that he may have made in breach of his duties as an employee.

**[75]** Nonetheless, as discussed above, the plaintiff's claim failed for want of proof.

COSTS

**[76]** Although I refused the plaintiff's prayers for relief, I awarded costs of RM100,000 to the plaintiff, to be borne equally by the defendants. I did so for the following reasons:

(a) firstly, the plaintiff has established that the defendants had breached their terms of employment, and therefore the plaintiff was partially successful in this action;

(b) secondly, although the general position is for costs to follow the event, there exists judicial discretion to depart from this rule, and in exceptional circumstances, costs may be awarded against a successful party (see *SDA Architects (sued as a firm) v Metro Millennium Sdn Bhd* [2014] 2 MLJ 627 (CA)). In *Devram Nanji Dattani v Haridas Kalidas Dawda* (1949) 16 EACA 35, a decision of the former East African

Court of Appeal, it was stated that:

> [A] successful defendant, who after all is brought into court against his will, can only be deprived of his costs when it is shown that his conduct, either prior to or during the course of the action, has led to litigation, which but for his own conduct might have been averted.

[77] In this particular instance, the conduct of the defendants had resulted in litigation having been brought by the plaintiff, and I considered it appropriate that they bear the costs. It may not have been proven that there existed a secret profit arrangement, but there was nevertheless impropriety on the part of the defendants due to the existence of the pecuniary relationship between them and the directors and shareholders of registered vendors to the plaintiff.

*Claim dismissed.*

Reported by Afiq Mohamad